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IN THE

Supreme Court of the United States

October Term 1975
No. 75-1129

HFH, LTD.,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

THE CITY OF CERRITOS, *et al.*,
Real Parties in Interest.

VON'S GROCERY COMPANY,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

THE CITY OF CERRITOS, *et al.*,
Real Parties in Interest.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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Petition for Writ of Certiorari to the Supreme Court of the State of California.

PRELIMINARY STATEMENT.

Petitioners are the victims of a discriminatory downzoning scheme in which their property was rendered worthless while all similar properties retained valuable commercial uses.

This case presents two issues for decision: First, if the downzoning is a *valid* exercise of the police powers, then Petitioners urge that they are entitled to just compensation for the resulting loss in value, nearly $325,000.00. Second, if the zoning regulation is later determined to be *invalid* Petitioners urge that

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they are entitled to just compensation for the "interim damages" sustained as a result of the temporary effect of the regulation.

I.

Opinion Below for Which Certiorari Is Sought.

Petitioners HFH, Ltd., and Von's Grocery Co., Inc., petition for certiorari to review a decision of the Supreme Court of the State of California appearing as *HFH, Ltd., et al. v. Superior Court,* 15 Cal.3d 508, Case Numbers LA 30382 and 30383.

II.

Jurisdictional Statement.

The opinion of the California Supreme Court was filed on November 12, 1975. Rehearing was denied on December 24, 1975. The jurisdiction of this Court is invoked pursuant to:

28 USC 1257(2) because the State Court denied Petitioners just compensation for "interim damages" resulting from a confiscatory zoning regulation. This ruling was based upon a statute, California Government Code Section 818.2, and

28 USC 1257(3) because the State Court denied Petitioners' claim for just compensation for the taking of their property in violation of the Fifth Amendment to the United States Constitution.

III.

Questions Presented for Review.

This petition presents two questions for review:

First: Does a "taking" of private property occur within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution, when a downzoning causes an 80% loss of value to private property, and

Second: Are the interim damages from an *invalid* zoning regulation compensable as a "taking" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

IV.

Constitutional Provisions Upon Which Petitioners Base Their Claim.

United States Constitution, Fifth Amendment

"No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment

"Nor shall any State deprive any person of . . . property without due process of law. . . ."

V.

Statement of the Case.

A. Federal Question.

In its opinion, the California Supreme Court concluded:

". . . neither the state and *federal constitution* . . ." compel just compensation for the taking of real property in land use regulation cases.

B. Stages of Proceeding.

This action arose when Petitioners filed a complaint for inverse condemnation in the State Court [See Ex. "B"]. A demurrer was sustained to their complaint on the grounds that they had failed to state a cause of action. State law forbids appeal from such orders,

so Petitioners sought Extraordinary review by writ. The Writs were issued by the State Court of Appeal in an opinion filed August 26, 1974.

The Real Party in Interest, City of Cerritos (hereinafter "The City") petitioned the State Supreme Court for a hearing. On November 12, 1975, after hearing the opinion which is the subject of this Petition for Certiorari [see Ex. "A"] was filed.

STATEMENT OF FACTS.

The following statement of facts is drawn from Petitioners' original complaint [Ex. "B"]. Since this case arises by demurrer, the allegations of the complaint are deemed true. Additional facts were brought to the attention of the State Court by requests for judicial notice.

Petitioners jointly acquired nearly six acres of vacant land located near a major intersection in the City of Cerritos, California. In 1966, Petitioners obtained a change of zone from A-1 (agricultural uses) to C-2 (commercial uses) [Ex. "B", pp. 49-50].

Petitioners planned the development of a neighborhood shopping center, and filed a subdivision map dividing the property into two "jigsaw-shaped parcels" comprising the building pad and parking area for the planned center. The City specifically approved this subdivision map [Ex. "B", p. 50].

In 1971, the City declared a moratorium on development in Cerritos, and rezoned Petitioners' property to an A-2 pending the completion of a new Cerritos general plan [Ex. "B", p. 51].

When completed in 1971, this new general plan designated a substantial portion of Petitioners' property as being for "neighborhood commercial" land uses [Ex. "B", p. 51], and the same uses were assigned to all other corner parcels in the intersection. Behind each corner strip, the new plan depicted "low-density residential uses."

Under California law, the City was required to produce a zoning map which "conformed" to the broad designations of the City's general plan (Calif. Gov. Code Section §65860), and, in anticipation of C-2 zoning (neighborhood commercial), Petitioners attempted to "package" the development and sell to a developer for the sum of $400,000.00. The sale was conditioned upon the re-establishment of C-2 zoning [Ex. "B", pp. 51-52].

The City rezoned two corner strips C-2 (a third corner is in another local jurisdiction but zoned and developed commercially). Petitioners' property was singled out for R-1 (single family residence) zoning, an expressly discriminatory category [Ex. "B", p. 53].

The sale fell through and Petitioners' $400,000.00 parcel was reduced in value to $75,000.00. As a result of its size, location, and other factors, the parcel is useless for residential development, and the R-1 zone results in a complete decimation of the property's value [Ex. "B", p. 54].

Pending appeal, other developments made clear the discrimination involved. These facts were brought to the attention of the Court by requests for judicial notice.

A 12-acre parcel across the street from the subject property was one of the parcels granted commercial zoning in 1972 [Ex. "B", p. 53]. It was the subject of plans for commercial development and in 1975, construction began on a shopping center [Ex. "C", p. 68].

The subject property, which has no value as a residential parcel, is now valueless for commercial uses as well because the neighborhood already has a completed shopping center.

Secondly, in 1975, the city included the subject property in its preliminary plan for a redevelopment project. Though subsequently deleted from the project, the original inclusion had the effect of freezing the property long enough to permit the competitors across the street to get under way. These facts were presented by request for judicial notice.

The result of these repeated exercises of the police power is the complete decimation of the value of Petitioners' land.

Petitioners urge that such a complete devaluation is compensable, even if the zoning regulation is valid. If the zoning is held to be *invalid*, Petitioners urge that their "interim losses" should also be compensable.

ARGUMENT.

Petitioners urge that the following rule of compensation be applied to land use regulations:

> When a land use regulation *substantially diminishes* the value of private property, the entity imposing the regulation must provide just compensation to the owner.

Petitioners urge that this rule is workable, just, and represents the final step in an historical movement toward regulation with compensation.

A. Just Compensation Should Be Paid for Substantial Economic Losses, Even Where the Police Powers Are Validly Exercised.

1. Historical Overview of Regulation.

The overwhelming weight of authority appears to forbid compensation for devastating exercises of the police power. In the area of land use regulation, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1929); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) are marshalled as examples of the rule.

To a great extent, the problem is historical. Courts were caught between a need to expand the police powers in a complex society and a curious line of authority which dealt harshly with "nuisances". The intertwining of these two themes led to dreadful results where non-nuisance activities were involved or where the exercise of the police powers was in a marginal area.

Earlier cases, such as *Euclid*, sought to uphold planning against constitutional attack. Their sweeping

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language was utilized as a means of justifying the *validity* of regulation where invalidation of the plan would have been disastrous. Unfortunately, these cases are now cited for the mistaken proposition that valid regulation cannot be accompanied by compensation.

A gradual concern for the economic *costs* of regulation has appeared in judicial opinions, perhaps because the expansion of the police power has become so all encompassing that the "validity" questions seem to have disappeared.

The validity of regulation was exhaustively treated in *Mugler v. Kansas*, 123 U.S. 623 (1887).

In *Mugler*, the court upheld a Kansas statute making the manufacture of alcoholic beverages illegal. Because the statute had the effect of devaluing private property, the petitioners sought, *inter alia*, just compensation for the taking. In denying compensation, the opinion focused on the need to abate "nuisances", and formulated a harsh distinction between the police powers and eminent domain by simply declaring losses due to the police powers to be non-compensable and eminent domain activities to be covered by the rules of just compensation. While it distinguished between the *results* which emanated from application of the two labels, it failed to give *any guidelines* for applying the labels in the first place.

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." (123 U.S. at 669).

Unfortunately, this harsh rule, when applied to non-nuisance cases, imposes serious hardships, and, in land use cases, courts immediately set up a "reasonableness" standard which included a "reasonable use" for the subject property after imposition of the regulation. *Nectow v. Cambridge*, 277 U.S. 183 (1928). This standard was largely derived from *Pennsylvania Coal Co. v. Mahon*, 206 U.S. 393, one of the few cases in which the economics of regulation has actually been discussed. Speaking for the Court, Mr. Justice Holmes directly confronted the issue of cost shifting:

> "The general rule at least is, that while property may be regulated to a certain extent, *if the regulation goes too far* it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Emphasis supplied) 206 U.S. 393, 415, 416.

The wisdom of this reasoning is obvious, because it acknowledges (1) the cost shift involved, (2) the public benefit in regulation and (3) the lack of a "qualitative difference between the police power and eminent domain". *Comment, An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal for Reform*, 33 Albany LR 537, 543 (1969).

Unfortunately, in their zeal to approve land use planning, courts simply refused to further confront the cost shifting involved. Holmes' admonition that ". . . the question at the bottom is upon whom

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the loss of the changes . . . should fall?" was lost in the shuffle. 206 U.S. at 416.

Thus, *Euclid* and its progeny have permitted enormous losses without ever asking Holmes' question of who should pay for them.

Secondly, the *Pennsylvania Coal Co. v. Mahon* test became lost in the rationale of "nuisance cases".

In *Mugler*, for example, the court specifically concluded that devastating losses incurred in abating nuisances were non-compensable. Subsequently, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) upheld an outright prohibition of a brickyard causing a 90% loss to the property owner, and *Goldblatt v. Hempstead*, 369 U.S. 590 (1963) upheld regulation of a quarry. The economic losses of the owner were "balanced" against the severe public detriment of the nuisance.

While harsh treatment of nuisances may seem justified, such rules cannot apply to non-nuisance cases.

Moreover, the analysis is inherently dishonest because the benefit/detriment balance can also be used to transfer the cost of the regulation. Logically, if a class of the benefiting public can be isolated, they should pay the cost. See Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 Univ. Chi. LR 681 (1973).

2. The Academic and Judicial Search for a New Order.

The result of this confusion has been an outpouring of comment and considerable study of regulation coupled with compensation. See Sax, *Takings and the Police Power*, 74 Yale LJ 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical*

Foundation of "Just Compensation" Law, 80 Harv. LR 1165 (1967); Bosselman, Callies and Banta, *The Taking Issue,* U.S. Govt. Printing Off. (1973); Van Alstyne, *Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria,* 44 So. Cal. LR 1 (1971). Hagman, *Windfalls & Wipeouts in the Good Earth of America* (C. Lowell Harris Ed. 1974).

It is now apparent that: (1) regulation is a necessary evil in a complex society, (2) the grounds for upholding regulation are so confused as to be virtually indescribable and (3) this confusion is the result of a judicial desire to permit regulation while simultaneously ignoring Holmes' "bottom line" question of the cost shift involved.

The reasoning of one recent decision of this Honorable Court shows hope for reforming this mess, and Petitioners urge that its analysis be extended to land use cases.

In *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) the validity of an extensive railroad reorganization and regulation plan was reviewed. It required the conveyance of railway properties, and liabilities to a government corporation. The creditors urged that such conveyance constituted an uncompensated "conveyance taking".

This Court approached the problem by:

> *First,* upholding the validity of the regulatory scheme; and
>
> *Second,* directly confronting the constitutional issue of just compensation.

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After upholding the validity of the regulations, the Court concluded that:

> ". . . there would then be recourse to a Tucker Act suit in the Court of Claims to cover any constitutional shortfall, the Rail Act does provide adequate assurance that any taking will be compensated." 419 U.S. 102, 155.

This holding is doubly significant because the Court found the compensation provisions to be the key to the constitutionality of the Act itself.

Petitioners urge that this analysis is no less applicable in land use regulations. The validity of the regulation hinges upon the problem involved and the means of regulation.

The issues of compensation hinge upon who should bear the cost, *Armstrong v. U.S.*, 364 U.S. 40 (1960), the loss to the owner, *United States v. General Motors Corp.*, 323 U.S. 373 (1945) and "fairness" in terms of public benefit and private burden.

Petitioners urge that these are *separate* considerations, and that the economics of cost shifting cannot be ignored in our zeal to uphold necessary land use regulations. If compensation provisions were necessary to uphold the Rail Act, they are no less necessary to uphold land use regulations.

B. Compensation for Substantial Losses Imposed by Land Use Regulations Is Both Workable and Will Actually Improve Local Planning.

1. Regulation With Compensation Is Workable.

Despite the hysterical cries of local municipalities, a compensatory regulation system is entirely workable. In England, such a system has worked well for some time.

As early as 1909, the Town and Country Planning Act provided compensation where property values were "injuriously affected by the making of a town planning scheme" (Section 54-67, 9 Edw. 7, c. 44).

In 1947, the Act was amended so that development rights were purchased by the government. Although the owner retained the right to *existing* uses, the government purchased all future development rights.

Following more recent amendments, development became permissible *only* under permit. Although the permits were free, the development restrictions were substantial. Where a permit for development in accordance with the plan or redevelopment of an existing use is refused, compensation is paid (Town and Country Planning Act of 1971, Section 168).

This system has been described in great depth by Hagman, *Articles 1 and 2 of the ALI Model Land Development Code: The English Are Coming,* 1971 ASPO Land Use Controls Ann. 3 (1972); Hagman & Pepe, *English Planning Law: A Summary of Recent Developments,* 11 Harv. LJ Legislation 557 (1974); and Mandelker, *Notes from the English: Compensation in Town & Country Planning,* 49 Cal. LR 699 (1961).

Suffice it to say that there is nothing inherently unworkable in such a system. The financial burdens are "one time" expenditures, and the administration is no more complex than any other form of cost accounting.

2. Compensable Zoning Would Improve Local Planning.

In addition to being fair to property owners, compensable zoning would benefit municipalities.

First: The traditional remedies of mandamus and injunction intrude the courts into the actual planning process and deny cities the opportunity to create flexible, local plans with harsh (but compensated) results.

Courts are simply the wrong vehicle for deciding how local planning tools should be employed, but they are eminently suited to impose and administer rules of compensation.

Second: Having to focus on the real economic costs of regulation would promote responsible planning in itself. A great many irresponsible decisions would simply be too expensive to be permitted.

Third: The discriminatory treatment (such as this case describes) would be deterred. Since, "under the inverse condemnation theory, the irresponsible public official may have caused the public to pay for the taking of property rights" (Calif. Zoning Practice Section 3.18, p. 56), zoning officials would think twice before acting on improper motives.

In short, compensation of losses caused by exercises of the zoning powers, would improve land use planning.

3. The "Substantial Impairment" Test Is an Appropriate Safeguard to Prevent Unwarranted Compensation From Occurring.

Petitioners urge that only "substantial impairment" of property values should be compensated. This test is both workable and fair.

It is little different from the "reasonable use" test, except that it demands that the remaining uses be *economically* reasonable. Under some conditions it is already in use in New York. *Cf. Town of Hempstead v. Lynne*, 222 N.Y.S. 526 (1961); *Bismark v. Incorp. Village of Bayville*, 267 N.Y.S. 2d 1002 (1966); and *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E. 2d 700 (1969).

Second, it avoids the problems of the "physical invasion" test, the "public use" test and other unrealistic distinctions that produce inconsistencies more in character with Lewis Carroll than with the judicial process.

Finally, it is no less ascertainable than the "reasonable use" test now in existence. It would turn upon the facts of each case and would simply inject economic cost shifting into the deliberations. Theoretically, the cost shift is already involved, but its involvement goes only to the *validity* of the regulation, and in that context it is simply inappropriate. Its application to valuation seems far more appropriate.

C. "Interim Damages" Are Constitutionally Required if the Regulation Is Invalid.

If the regulation imposed upon Petitioners' property is *invalid*, equitable relief will not help them. Their property is now worthless, *regardless* of its zone, because:

1. A competing developer has completed a 12-acre shopping center across the street [see Ex. "C"].
2. Petitioners have out-of-pocket expenses for taxes, insurance and interest during the pendency of this litigation and,
3. The costs of the litigation itself have to be borne in order to obtain what the Constitution guarantees in the first place.
4. Finally, construction costs are rising so rapidly that a development which was feasible in 1972 may be financially impossible in 1976.

In short, the availability of equitable relief is tantamount to no relief at all.

Petitioners are left with a situation once described in *Averne Bay Const. Co. v. Thatcher,* 278 N.Y. 222 (1938) in that:

> ". . . The restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."
>
> 15 N.E. 2d 587 at 592.

Of some guidance in this regard is *Keystone Associates v. State* (Opinion filed July 23, 1975) 371 N.Y. Supp. 2d 814. As the Court is aware, this is the third reported "Keystone Associates case" and is one of a long line of cases involving the same litigation.

In *Keystone,* the purchasers of property were inhibited from developing in accordance with their plans by a State Historical Commission which was later declared to be unconstitutional (*Keystone Associates v. Moerd-*

ler, 19 N.Y. 2d 78). *Keystone* subsequently brought suit for the damages which were incurred as a result of the delay imposed by the Commission. The suit was brought pursuant to legislation adopted after the litigation began.

Specifically, they sought compensation for the increased cost of construction and the loss of profits from the building which they were not able to complete.

In reviewing the entire matter of the extended delay imposed upon the property owners, the Court of Claims observed:

> "The foreseeable and certain effect of the delay to which *Keystone* was subjected was the increase of construction and its loss of profit from the completed building for the period of the delay in its completion. This Court believes that a measure of damages relating to such increased cost and loss of profit must be applied to carry out the clearly apparent intent of the Court of Appeals as to an appropriate measure of damages." 371 N.Y. Supp. 2d 814, 820.

Additionally, the Court compensated *Keystone* for attorneys' fees and related expenses incidental to the litigation.

Finally, if there is any question about the damage which has occurred as a result of the delay, and the futility of any equitable relief herein, that doubt is dispelled by the fact that permits have been issued for the construction of a neighborhood shopping center on a parcel immediately across the street from the subject property. As Petitioners informed the Court by judicial notice, a shopping center, including a super-

market will soon be completed. It now appears that the intersection upon which Petitioners' property is located will have a competing facility open years before Petitioners' could possibly open a facility of their own. Even if they were given commercial zoning today, they could not hope to develop the property in time to be competitive.

If the zoning of Petitioners' property is illegal and voidable, a simple restoration of commercial zoning will not make them whole, and compensation for the interim losses they have incurred is necessary to formulate *any* judicial relief worth giving them.

D. The Need for Uniformity of Decision Requires the Guidance of an Opinion From This Court.

The maze of inconsistent results, "forum shopping" and a growing volume of litigation involving confiscatory land use regulation, require that this court confront the issues presented herein.

The "simple" planning of the *Town of Euclid* has given way to "Innovative Planning Schemes", Freedman, *Innovative Land Use Controls, etc.*, 50 L.A. Bar Bull. 252 (1972), Coastal Management Zones (*Calif. Pub. Resources Code*, Section 2700 et. seq.), Conditional Use Permits, Open Space Zoning, and a host of other devices which make land use regulation far more intrusive than *Euclid* envisioned. The sheer complexity of these devices raises the "petty larceny" of the police powers to the level of grand theft.

Moreover, every court system is searching for guidance. The confusion over constitutional standards is illustrated by the inconsistent results which courts reach.

For example, on virtually identical facts, California has reached a conclusion opposite to that of New Jersey and Connecticut on the application of confiscatory tidelands and flood plain regulations. See *Candlestick Properties, Inc. v. S.F. Bay Conserv. Dist., etc.*, 11 Cal. App. 3d 557 (1970) as compared to *Morris County Land Improvement Dist. v. Township of Parsippann, etc.*, 193 A. 2d 232 (N.J. 1963) and *Dooley v. Town Plan & Zoning Comm.*, 197 A. 2d 770 (Conn. 1964). These decisions are absolutely contrary to one another and all purport to be decided under the same constitutional provisions.

In its opinion below, the California Supreme Court typified this confusion when it concluded that police powers were not compensable because they were exercises of the police power [Ex. "A", p. 10]. This circular reasoning has been repeated elsewhere and on occasion rejected with equally little reasoning. Van Alstyne, *Taking or Damaging by the Police Power, supra.*

The tests of "physical invasion", "pre-condemnation regulation" and "public use" are equally unhelpful because they do not explain the economic result or seem consistent with the "loss to the owner" test of *United States v. General Motors, supra.*

Finally, all court systems are literally jammed with this type of litigation, and abstention from the issue would be counter productive. The potential for "forum shopping" between state and Federal courts is growing and the potential for further inconsistent results is growing with leaps and bounds. A month after this opinion came down from the State Court, two cases resulted in opening the Federal Courts to California litigants with the same problem. See *M. J. Brock*

& Sons, Inc. v. City of Davis, No. CS 74-364 (N.D. Calif. 1974) and *Arastra Ltd. Partnership v. City of Palo Alto,* 401 F. Supp. 962 (N.D. Calif. 1975).

Such a lack of uniformity opens the door to the worst type of "forum shopping". Moreover, it will soon overload the Federal Courts. The solution to this dilemma is to simply establish uniform, constitutional criteria for all courts.

This case presents an opportunity to take the final step in a trend toward recognizing economic losses for what they are and to set forth the reasons for awarding compensation. It is an opportunity to replace the imposition of judicial labels with workable criteria for decision.

More than anything else, it is an opportunity to reduce an unmanageable number of regulatory problems to a workable system of rules, that will distribute the costs of regulation on a predictable basis.

CONCLUSION.

Petitioners pray that their petition be granted and that this Honorable Court take the final step toward a rational policy of regulation with just compensation.

Respectfully submitted,

TELANOFF, BOBROWSKY, WALLIN & DILKES,
By C. EDWARD DILKES,
Attorneys for Petitioners.

EXHIBIT A.

In the Supreme Court of the State of California.
In Bank

HFH, Ltd., Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest. L.A. 30382.

Von's Grocery Company, Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest. L.A. 30383.

Filed: November 12, 1975.

We face in these mandate proceedings[1] the narrow issue of whether a complaint alleging that a zoning action taken by a city council reduced the market value of petitioners' (hereafter plaintiffs) land states a cause of action in inverse condemnation; we conclude that it does not. We also face numerous amici, some of whom urge on us significant changes in the law of liability and compensation in public land use regulation; we have concluded that neither the state and federal Constitutions nor public policy compel or counsel these changes.

We take the facts in this case from the allegations of the complaints, assuming as we must the truth of any properly pleaded factual allegations. (E.g., Serrano v. Priest (1971) 5 Cal.3d 584, 591.) Plaintiffs, a limited partnership (HFH) and a Delaware corporation (Von's), contracted to purchase the parcel in question from a common grantor. At the time the plaintiffs entered this contract with their grantor, the

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[1]The two cases before us originated in separate lawsuits concerning the same parcel of land. All parties agree that they present identical legal issues; they were consolidated in the Court of Appeal for this reason, and we shall hereafter refer to them as a single proceeding.

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land in question lay in an agricultural zone and possessed no improvements of any kind. Plaintiffs conditioned the sale upon the grantor's ability to procure commercial zoning for the 5.87-acre tract; the City of Cerritos (the real party in interest) "in the latter part of the year 1965 or the early part of 1966" did classify the property as commercial, and in 1966 the plaintiffs became the owners of the parcel, according to the allegations of the complaint.

Plaintiffs thereafter submitted, and the city approved, a parcel map on which the plaintiffs subdivided the property in a manner appropriate for commercial uses. Subsequently, however, a period of some five years elapsed; during that time plaintiffs do not claim any development or establishment of a more intensive use of the land. In July 1971, with the land still in this undeveloped state, according to the allegations before us, the city placed a moratorium upon more intensive uses of the property by temporarily zoning it as agricultural, the classification it had borne before plaintiffs acquired it. Plaintiffs do not allege that this moratorium interfered with any use of the land which they then planned nor do they allege that they then challenged this reclassification.

In October 1971, the city adopted a general plan indicating that some land in the area of plaintiffs' properties was appropriate for "neighborhood commercial uses," but did not alter the agricultural classification of plaintiffs' tracts. The 1971 general plan designated the bulk of the land in the area of plaintiffs' properties for "low density residential" uses. (City of Cerritos October 1971 General Plan Map; Evid. Code, § 452, subd. (b).)

Having apparently concluded that their interests would best be served by selling rather than developing the land, plaintiffs in early 1972 entered into a $400,000 contract of sale with Diversified Associates, Inc. (not party to this action) conditioned upon the reclassification of the tract as commercial. In an attempt to bring about the condition which would enable them profitably to sell their land, plaintiffs applied to the planning commission for commercial zoning of the tract. Both the commission and the city council, to which plaintiffs took an appeal, rejected this application, and instead zoned the property as single family residential. Concurrently with taking this action, the city zoned as commercial other properties on different corners of an intersection on which plaintiffs' land abuts. Plaintiffs, of course, had hoped to secure for their land a commercial classification in order to effectuate the conveyance of the land under the conditions of the contract of sale with Diversified Associates, Inc.

Plaintiffs allege that the situation of their properties rendered them "useless" for single family residential purposes; they do not, however, allege that the properties are useless for *other* purposes consonant with the zoning category in which they now lie.[2] As a

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[2]Plaintiffs also complain of the deprivation "of any reasonably beneficial use of . . . said properties commensurate with its value." In the same section of their complaints, however, they allege a remaining fair market value of $75,000. The substantial value of their land rebuts the allegation that they cannot enjoy any reasonably beneficial use of it. As to use "commensurate with value," we note the tautological quality of this statement: "Value" is of course not an objective quality, but a social attribute of legal rights. Only if we concluded that plaintiffs enjoyed a vested right in a previous zoning classification would the city's action have deprived them of a use commensurate

(This footnote is continued on next page)

consequence, according to plaintiffs, their land, which they purchased for some $388,000 and hoped to sell for $400,000, suffered a decline in market value to $75,000.

The trial court sustained a demurrer without leave to amend to plaintiffs' cause of action in inverse condemnation and plaintiffs sought review.[3]

1. *Inverse condemnation does not lie in zoning actions in which the complaint alleges mere reduction of market value.*

The courts of this state have recognized the constitutional values served by actions in inverse condemnation

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with value; our courts have, however, clearly and frequently rejected the position that landowners enjoyed a vested right in a zoning classification. (E.g., Morse v. San Luis Obispo County (1967) 247 Cal.App.2d 600.)

[3]The trial court also sustained demurrers to other counts, granting leave to amend for purposes of adding a cause of action in mandate. These counts are not before us, for plaintiffs seek review only of the order sustaining the demurrer to the inverse condemnation count and pray for a writ of mandate directing the trial court to overrule that demurrer.

At oral argument plaintiffs and their amici curiae stressed the trial court's failure to allow amendment of their pleading. We recognize, of course, the requirement of liberality in permitting amendment of pleadings "in furtherance of justice." (Code Civ. Proc., § 473; e.g., Klopstock v. Superior Court (1941) 17 Cal.2d 13, 19-20.) Nothing in this policy of liberal allowance, however, requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment. Speaking to circumstances like those of the instant case, we have said: "[T]he burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations omitted.] Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleadings." (Cooper v. Leslie Salt Co. (1969) 70 Cal.2d 627, 636; Filice v. Boccardo (1962) 210 Cal.App.2d 843, 847.) Thus plaintiffs, while implying that they might in an unspecified manner amend their complaint to state a cause of action, fail to suggest

and have not hesitated to validate complaints appropriately employing this theory of recovery.[4] At the same time, we have recognized mandamus as the proper remedy for allegedly arbitrary or discriminatory zoning,[5] and have in appropriate cases struck down land use restrictions which suffered from procedural or substantive deficiencies.[6]

We have never, however, suggested that inverse condemnation lay to challenge a zoning action whose only alleged effect was a diminution in the market value of the property in question. (E.g., Morse v. County of San Luis Obispo (1967) 247 Cal.App.2d 600.) While this state of the law is sufficiently clear to admit of little doubt, we shall briefly review its development and basis.

Zoning developed slowly in the latter part of the 19th century. In its early stages it was frequently indistinguishable from the power to abate public nuisances,[7] but the first decades of this century saw the

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any relevant facts with which they could supplement their pleading. We shall therefore determine this question below without reference to other possible facts which might enable them successfully to state a cause of action in inverse condemnation. (Cf. fn. 14, *infra.*)

[4]Albers v. City of Los Angeles (1965) 62 Cal.2d 250; Holtz v. Superior Court (1970) 3 Cal.3d 296; Aaron v. City of Los Angeles (1974) 40 Cal.App.3d 471; see generally 10 California Law Revision Commission Reports (1971) California Inverse Condemnation Law.

[5]E.g., Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 128.

[6]Broadway, Laguna, etc. Assn. v. Board of Permit Appeals (1967) 66 Cal.2d 767; Hamer v. Town of Ross (1963) 59 Cal.2d 776; Johnston v. Board of Supervisors (1947) 31 Cal.2d 66; Skalko v. City of Sunnyvale (1939) 14 Cal.2d 213; Tustin Heights Assn. v. Board of Supervisors (1959) 170 Cal.App.2d 619.

[7]In re Hang Kie (1886) 69 Cal. 149; see Mugler v. Kansas (1887) 123 U.S. 623.

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enactment of more comprehensive zoning laws and the development of the concept of city planning.[8]

Shortly after these changes began to take effect, challenges in both state and federal courts raised the question of the constitutionality of these restrictions of the individual's previous ability to do with his land what he chose, bounded only by the laws of public and private nuisance. While the legal context in which this question arose differed from case to case, the courts of this state and the United States Supreme Court firmly rejected the notion that the diminution of the value of previously unrestricted land by the imposition of zoning could constitute a taking impermissible in the absence of compensation.[9] We have long adhered to that position.[10]

To demonstrate the settled nature of the issue before us we point out that the United States Supreme Court faced the same question in the first major constitutional challenge to modern zoning to come before it. (Euclid v. Ambler Realty Co. (1926) 272 U.S. 365.) Tendering allegations almost identical to those urged here, the appellee in *Euclid* claimed that "the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immedi-

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[8]California enacted its first statewide zoning law in 1917. (Stats. 1917, ch. 734, p. 1419.)

[9]E.g., Welch v. Swasey (1909) 214 U.S. 91; Euclid v. Ambler Realty (1926) 272 U.S. 365; Miller v. Board of Public Works (1925) 195 Cal. 477.

[10]E.g., McCarthy v. City of Manhattan Beach (1953) 41 Cal.2d 879; Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal.2d 515; see Selby v. City of San Buenaventura (1973) 10 Cal.3d 110; State of California v. Superior Court (Veta) (1974) 12 Cal.3d 237.

ately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre. . . ." (*Id.*, at p. 384.) The court upheld the zoning against the claim that it constituted a taking of the property in question, settling some half century ago the question in the instant case.

The record of this court stands equally clear. In one of the seminal zoning cases coming before us, in considering and rejecting a contention that a zoning ordinance forbidding the establishment of a non-conforming use in a residential area unconstitutionally deprived the landowners of their property, we quoted with approval the following language of the Wisconsin Supreme Court: " 'It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. . . . [I]ncidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare are not considered a taking of the property for which compensation must be made. (Carter v. Harper [1923] 182 Wis. 148 [153]. . . .)" (Miller v. Board of Public Works, *supra*, 195 Cal. 477, 488.)

In an attempt to escape the clear import of such rulings plaintiffs emphasize that their complaint sounds in inverse condemnation, and that they therefore need only show some diminution in value rather than the arbitrary or confiscatory action imposed by the line

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of cases they seek to avoid. Several appellate courts in California have considered and rejected precisely this contention.[11]

The Court of Appeal in Morse v. County of San Luis Obispo, *supra*, 247 Cal.App.2d 600, spoke as follows in affirming a judgment of dismissal following the sustaining of a demurrer to a complaint seeking damages in inverse condemnation for the down-zoning of property: "Plaintiffs are apparently attempting to recover profits they might have earned if they had been successful in getting their land rezoned to permit subdivision into small residential lots, but *landowners have no vested right in existing or anticipated zoning ordinances.* (Anderson v. City Council [1964] 229 Cal.App.2d 79, 88-90 [40 Cal.Rptr. 41].) A purchaser of land merely acquires a right to continue a *use* instituted before the enactment of a more restrictive zoning.[12] Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power 'some uncompen-

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[11]State of California v. Superior Court (Veta) (1974) 12 Cal.3d 237; Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110; Gisler v. County of Madera (1974) 38 Cal. App.3d 303; Morse v. County of San Luis Obispo (1967) 247 Cal.App.2d 600; Smith v. County of Santa Barbara (1966) 243 Cal.App.2d 126.

[12]Plaintiffs have failed to allege any existing use that was in nonconformity with the residential zoning classification now in effect; as far as the allegations of their complaint disclose, the land remains in the same state as the day the plaintiffs acquired it. Thus we need not here consider the question of a nonconforming use which the zoning authority seeks to terminate or remove; for plaintiffs have alleged that they enjoy a vested right, not in an existing *use*, but in a mere zoning *classification* on vacant land. This case therefore raises no issue of the constitutionality of a zoning regulation which requires the termination of an existing use. (Cf. Livingston Rock etc. Co. v. County of Los Angeles (1954) 43 Cal.2d 121, 127.)

sated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community.' (Metro Realty v. County of El Dorado [1963] 222 Cal.App.2d 508. . . .)" (247 Cal.App.2d at pp. 602-603; emphasis added.)

We have only recently reaffirmed this principle in Selby Realty Co. v. City of San Buenaventura, *supra,* 10 Cal.3d 110;[13] we held in that case that a landowner could not employ inverse condemnation to challenge a zoning ordinance which required him to dedicate part of his land to the city as a condition of receiving a building permit: "The sixth cause of action sounds in inverse condemnation and alleges that the city has 'taken' plaintiff's property without compensation. Again, insofar as this cause of action is based upon the adoption of the general plan, there is no 'taking' of the property. . . . The appropriate method by which

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[13]Plaintiffs argue that *Selby* is distinguishable because that case involved a uniform zoning classification while in the instant case plaintiffs have tendered allegations of discriminatory zoning classification. The asserted distinction lacks substance. Plaintiffs have a remedy in a mandate action against discriminatory zoning. (Code Civ. Proc., § 1094.5.) Both their complaint and their briefs in this case, however, urge that the injury constituting the taking was the reduction in market value of the land. If such a reduction constituted an injury, it would occur regardless of the zoning action occasioning it; indeed we have held that the wrongfulness of the state's action is irrelevant in an inverse condemnation case. (E.g., Holtz v. Superior Court (1970) 3 Cal.3d 296, 302.) Thus, *if* plaintiffs have suffered an injury cognizable under California Constitution, article I, section 19, they stand entitled to compensation regardless of the public agency's wrongfulness in causing the injury. If, on the other hand, the city has acted arbitrarily or discriminatorily in passing the zoning ordinance of which they complain, plaintiffs stand entitled to relief by administrative mandate. Since governmental fault is irrelevant in an inverse condemnation action, *Selby's* discussion of the impropriety of inverse condemnation as a remedy for allegedly improper zoning is apposite to the instant case.

to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." (10 Cal.3d at pp. 127-128.)[14]

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[14]Neither *Selby* nor this case presents the distinct problems arising from inequitable zoning actions undertaken by a public agency as a prelude to public *acquisition* (Klopping v. City of Whittier (1972) 8 Cal.3d 39; Peacock v. County of Sacramento (1969) 271 Cal.App.2d 845); or from zoning classifications invoked in order to evade the requirement that land *used* by the public must be acquired in eminent domain proceedings (Sneed v. County of Riverside (1963) 218 Cal.App.2d 205). Thus in *Klopping* the city in question made public announcements that it intended to acquire the plaintiff's land, then unreasonably delayed commencement of eminent domain proceedings, with the predictable result that the property became commercially useless and suffered a decline in market value. We held only that the plaintiff should be able to include in his eminent domain damages the decline in value attributable to this unreasonable precondemnation action by the city. The case thus in no way resembles the instant one, in which plaintiffs make no allegations that the city intends to condemn the tract in question.

Similarly in *Peacock* the county had refused to permit any development of the land in question (barring even the growth of most vegetation), while assuring the owner that the restrictions were of no consequence because the county intended to acquire the land for an airport. When, after denying the owner any use of his property for five years, the county renounced its intent to acquire the land, the Court of Appeal affirmed a trial court finding that " '[t]he exceptional and extraordinary circumstances heretofore enumerated constituted a take [*sic*] of the subject property by inverse condemnation.' " (271 Cal. App.2d at 854.) Again one sees that the down-zoning rises to a taking only in connection with inequitable precondemnation actions by the public agency.

Finally, the cases hold that a public agency may not use a zoning ordinance to evade the requirement that the state acquire property which it uses for public purposes. Thus in *Sneed,* the county, rather than acquiring land for an air navigation easement, simply enacted a zoning ordinance forbidding any structure or vegetation more than three inches high and proceeded to operate flights over the area thus restricted. The Court of Appeal held that the plaintiff had stated a cause of action in inverse condemnation. Unlike the instant case, *Sneed* involved a zoning ordinance creating an actual public use of the property.

Plaintiffs' amici curiae, however, strenuously argue that California Constitution, article I, section 19 [former article I, section 14], which provides that "[p]rivate property may be taken *or damaged* for public use only when just compensation . . . has first been paid. . . ." (emphasis added) requires a ruling in their favor. Emphasizing the italicized words, plaintiffs contend first, that the California Constitution provides wider protection than the federal, and second, that the city in enacting the challenged zoning ordinances "damaged" their property and must therefore pay compensation. Only the first of these contentions is accurate.

This court has recognized the broader protections granted landowners by the addition of "or damaged" to the language of our state's compensation clause. (Albers v. County of Los Angeles (1965) 62 Cal.2d 250; Reardon v. San Francisco (1879) 66 Cal. 492; cf. County of San Diego v. Miller (1975) 13 Cal.3d 684.) Yet in arguing that the additional phrase covers this case, plaintiffs mistake its meaning. Intended to reach situations in which government activity damaged land without taking it, the provision in question does not apply to this case, in which undamaged land has allegedly suffered only a diminution of market value.[15]

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[15]As we explained in Holtz v. Superior Court (1970) 3 Cal.3d 296, 310: "Our decision in the instant case, and the *Albers* decision more generally, in effect recognize that, under article I, section 14 [present article I, section 19] *physical damages* proximately resulting from a public improvement must be considered as direct a 'cost' as the property actually condemned or the materials actually utilized in its construction." (Emphasis added.) Thus, while we have not hesitated to afford individuals the full measure of the protection indicated by the history of article I, section 19, no California case has ever interpreted the "or damaged" phrase of our state Constitution to cover mere diminution of market value of property.

Plaintiffs fail to distinguish between the "damaged" property which is a requisite for a finding of compensability and the "damages" by which courts measure the compensation due. Reasoning backwards, plaintiffs erroneously contend that since they can calculate damages (by measuring decline in market value), they must have been "damaged" within the meaning of the state Constitution.

Because a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging, the trial court correctly sustained without leave to amend the demurrer to the cause of action in inverse condemnation.[16] (Cal. Const., art. I, § 19 [former art. I, § 14].)

2. *Plaintiffs may not seek damages in their pending mandate action.*

Plaintiffs also urge, alternatively to the proposition that inverse condemnation lies for any reduction in market value induced by zoning, the desirability of *interim* damages incident to the mandate action for which the trial court granted leave to amend. They argue that even if they ultimately succeed in their efforts to obtain a court decision invalidating the challenged zoning ordinance, they will still suffer an uncompensated loss of use of the property in question during the period between the enactment of the challenged ordinance and its demise. Arguing by implicit analogy

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[16]This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day.

to tort law, they urge that invalidation of the offending zoning ordinance will not suffice to compensate them for the damage they suffered by reason of its existence.

In so arguing, however, they overlook the distinction between a tort suit and a mandate action: the former enables the wronged plaintiff to recover compensatory damages; the latter permits a party suffering from improper governmental action to correct administrative abuse. The cases have long acknowledged this distinction, one deeply rooted in the theory of our polity.

Courts have thus recognized that "[o]f course, it is not a tort for Government to govern. . . ." (Dalehite v. United States (1952) 346 U.S. 15, 57 (Jackson, J., dissenting); Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state. (Cf. City & County of San Francisco v. Cooper (1975) 13 Cal.3d 898; Fletcher v. Peck (1810) 10 U.S. (6 Cranch) 87.)

Thus acts within the area of legislative or administrative discretion have long enjoyed the shelter of immunity from tort liability; mere ministerial and "operational" acts, but not "basic policy decisions," have led to governmental tort liability. (Johnson v. State of California (1968) 69 Cal.2d 782, 793.) This distinction finds expression directly relevant to the instant case in the California Tort Claims Act, which provides that "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment.

. . ." (Gov. Code, § 818.2.) The zoning ordinance of which plaintiffs complain is, of course, an "enactment" within the meaning of section 818.2. (Gov. Code, § 810.6.) We have recently held that an analogous tort immunity for the denial of a building permit (Gov. Code, § 818.4) constituted specific legislation qualifying the general rule that one may append a damage claim to a mandate action (Code Civ. Proc., § 1095). (State of California v. Superior Court (Veta), *supra,* 12 Cal.3d 237, 244-247.) Plaintiffs suggest no distinction between Government Code section 818.2, which confers immunity for legislation, and Government Code section 818.4, which protects building permit decisions; thus *Veta's* holding applies equally to this case.

Nor may plaintiffs avoid the clear meaning of Government Code section 818.2 and *Veta* by arguing that the damage claim sounds in inverse condemnation rather than in tort. The fallacy in the argument inheres in its failure to recognize that inverse condemnation lies only for a taking or damaging, while improper zoning actions may generally be attacked only by mandate. As we have shown above, plaintiffs have not alleged facts showing a taking or damaging; plaintiffs therefore may not add a damage claim to their pending mandate action.

3. *Although amici argue that "fairness" requires that inverse condemnation lie to challenge zoning actions, both considerations of policy and the limitations of judicial institutions lead to a contrary conclusion.*

Numerous amici who have entered this case on behalf of the plaintiffs urge that the constitutional values of "fairness" protected by the compensation

clauses of the state and federal Constitutions require us to hold that inverse condemnation lies for any zoning action which reduces the market value of any tract of land.[17] Without attempting a detailed discussion of the many points raised by amici or a review of the still more voluminous secondary literature on the taking issue,[18] we shall briefly indicate the grounds for our declining to do so.

In this case, as in most instances, zoning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate.

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[17]Citing County of San Diego v. Miller (1975) 13 Cal.3d 684, plaintiffs and their amici argue that the only consideration in this case relates to the "fairness" of the principle for which they contend; to this somewhat broad argument two answers present themselves. First, plaintiffs ignore the context of *San Diego;* the issue in that case was the distribution of a condemnation award which all conceded to be appropriate, not whether otherwise lawful state action constituted a "taking." Second, on a more basic level, we are deeply mindful of the "basic equitable principles of fairness" (United States v. Fuller (1973) 409 U.S. 488, 490) which shape this area of the law. We set forth below some of the considerations which cast doubt on plaintiffs' claim even under this broad and only tenuously legal rubric of constitutional "fairness."

[18]E.g., Berger, *A Policy Analysis of the Taking Problem* (1974) 49 N.Y.U.L.Rev. 165; Bosselman et al., The Taking Issue (1974); Cotsonis, *Development Rights Transfer: An Exploratory Essay* (1973) 83 Yale L.J. 75; ....., *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks* (1972) 85 Harv.L.Rev. 574; Hagman, *A New Deal: Trading Windfalls for Wipeouts* (1974) 40 Planning 9; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv.L. Rev. 1165; Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space* (1974) 2 Real Est.L.J. 635; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* (1970) 44 So.Cal.L.Rev. 1.

The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question.[19] Plaintiffs in this case therefore find themselves in a somewhat uncomfortable position: they wish to reap the benefit in the form of higher market values of their land, of the restrictive zoning on other properties, but do not wish to bear the reciprocal burden of such zoning when it applies to their property. They thus would avoid the enforcement of residential zoning on their property while benefiting from its enforceability as to other property.

The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change. The real possibility of zoning changes for the tract in question finds ample demonstration in plaintiffs' insistence that their grantor procure such a change before conveying the land to them. Having obtained the benefits of such rezoning, but having failed to take advantage of it by building, they now assert that the termination of such rezoning rendered the

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[19]As one of plaintiffs' amici has written in another context, "[W]hile one can conceptually separate windfalls caused by government [e.g., by zoning actions] from those caused by the community, they are very hard to disentangle and measure." (Hagman, *A New Deal: Trading Windfalls for Wipeouts* (1974) 40 Planning 9; see also Cotsonis, *Development Rights Transfer: An Exploratory Essay, supra,* 83 Yale L.J. 75; Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space, supra,* 2 Real Est. L. J. 635.)

city liable in damages. A distinguished commentator has thus described plaintiffs' situation: "[They] bought land which [they] knew might be subjected to restrictions; and the price [they] paid should have been discounted by the possibility that restrictions would be imposed. Since [they] got exactly what [they] meant to buy, it can perhaps be said that society has effected no redistribution so far as [they are] concerned, any more than it does when it refuses to refund the price of [their] losing sweepstakes ticket." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv.L.Rev. 1165, 1238; see also Berger, *A Policy Analysis of the Taking Problem* (1974) 49 N.Y.U.L.Rev. 165, 195-196.)

We are urged in this case to redefine the state and federal constitutional requirements of just compensation and to require payment for any zoning action which results in the diminution of market value. That we do not do so reflects less our belief that no problems exist with the present law in this area than our conviction that legislative rather than judicial action holds the key to any useful reform. The welter of proposals for action to remedy the inequities in the scheme of land use regulation which fall short of invoking constitutional protection bear ample witness to the ferment in this area.[20] Without passing on the desirability or legality of any of the proposed plans, we note that almost without exception they require legislative action for their implementation.[21]

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[20]See footnote 18, *supra.*

[21]E.g., Cotsonis, *Development Rights Transfer: An Exploratory Essay* (1973) 83 Yale L.J. 75; Rose, *A Proposal for*

(This footnote is continued on next page)

The complexity of the schemes proposed and the administrative machinery required for their effectuation obviously exceed anything readily feasible as a judicial remedy. Thus even if we were wholeheartedly to concede the wisdom of these plans, they would lie beyond our remedial powers.[22]

Finally, we note that our conclusion in no sense turns on the verbal distinction between "taking" and "police power." While these terms have a venerable history in discussions of this question, at best they have served as a shorthand method of indicating the result; neither hard nor easy cases are decided by such merely verbal lines. Rather, the far more basic considerations of reciprocity discussed above have shaped the decisions in this area,[23] decisions which reconcile property rights and social needs.

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the Separation and Marketability of Development Rights as a Technique to Preserve Open Space, supra, 2 Real Est. L. J. 635; Berger, *A Policy Analysis of the Taking Problem, supra,* 49 N.Y.U.L.Rev. 165; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, supra,* 80 Harv.L.Rev. 1165, 1252: "[T]he courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between the courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require."

[22]Moreover, we do not accept the suggestion of some of plaintiffs' amici that we recognize their cause of action as a way of goading the Legislature into actions felt to be desirable.

[23]Professor Michelman has written: "We have, in effect, been searching for a useful and satisfying way to identify the 'evil' supposedly combatted by the constitutional just compensation provisions, and have now suggested equating it with a capacity of some collective actions to imply that someone may be subjected to immediately disadvantageous or painful treatment for no other apparent reason . . . than that someone else's claim to satisfaction has been ranked as intrinsically

Plaintiffs in this case desire a change in long standing principles of the law of just compensation; they ask that we hold municipal zoning bodies liable for full compensation for any fall in market price due to zoning actions. Yet plaintiffs can cite no case and little by way of other considerations to support their claim of entitlement to compensation by reason of a change in zoning. Hoping to build a shopping center, they purchased a tract previously zoned as agricultural land. For reasons which do not appear in the record, they did not build for five years, although no zoning impediments are alleged to have existed. Now they desire to sell that land at a profit to yet another developer and complain that the city has in the meantime concluded that its interests would best be served by residential rather than commercial development of the tract in question. Unable to make the desired profit from the sale of their land, they now seek to recoup it from the city; in so doing they mistake the law.

Zoning and other land use regulation, long an established feature of our lives, expresses both a concern for our present quality of life and our collective fiduciary responsibility to the future; that it bears this weight

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superior to his own. . . . We should, then, consider carefully the extent to which the 'fairness' or utility rationale is already reflected, even if inexplicitly, in the judicial doctrines which presently compose the main corpus of our just compensation lore. My conclusion is that these doctrines do significantly reflect the line of thought which has been elaborated in these pages. . . ." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, supra,* 80 Harv.L.Rev. 1165, 1224-1226.

and expresses this concern does not mean that it may fall short of constitutional standards. These considerations do, however, caution us not capriciously to discard established constitutional boundaries in this area.

The alternative writs are discharged, and the peremptory writs denied.

Tobriner, *J.*

We Concur:

Wright, *C. J.*
McComb, *J.*
Mosk, *J.*
Sullivan, *J.*
Richardson, *J.*

HFH v. Superior Court (Los Angeles) L.A. 30382.

Von's Grocery Company v. Superior Court (Los Angeles) L.A. 30383.

DISSENTING OPINION BY CLARK, J.

I dissent.

Article I, section 19 of the California Constitution provides: "Private property may be taken *or damaged* for public use only when just compensation . . . has first been paid to . . . the owner." (Italics added.) While this court has usually applied the "or damaged" language in the context of physical damage to property (Albers v. County of Los Angeles (1965) 62 Cal.2d 250; Bacich v. Board of Control (1943) 23 Cal.2d 343), we have never limited compensation to physical damage. In fact, in Reardon v. San Francisco (1885) 66 Cal. 492, this court rejected such an interpretation, noting that the word *damaged* "refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking." (*Id.* at p. 501.) " 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the [government] should not pay for property which it destroys or impairs the value, as well as for what it physically takes.' " (Bacich v. Board of Control, *supra,* 23 Cal.2d 343, 351.)

The 80 percent decrease in fair market value of the subject property clearly constitutes damage to plaintiffs. The issue then is whether plaintiffs' damage is compensable under the California Constitution.

BLEED THROUGH

California has long recognized that while "the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. [Citations.]" (House v. L.A. County Flood Control Dist. (1944) 25 Cal.2d 384, 388; see Berman v. Parker (1954) 348 U.S. 26.)

The point at which an injury becomes compensable is determined by balancing two fundamental—yet inconsistent—policy considerations. (Bacich v. Board of Control, *supra,* 23 Cal.2d 343.) "[O]n the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost." (*Id.* at p. 350.)

This balancing of policies in determining the point at which compensation is constitutionally mandated also has long been recognized by the United States Supreme Court. In Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, the court noted that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its

limits. . . . One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." (*Id.* at p. 413.)

As this court has recently recognized in viewing these conflicting policies, the ultimate test whether compensation is constitutionally required, resolves itself into one of fairness. (County of San Diego v. Miller (1975) 13 Cal.3d 684, 689; Southern California Edison Company v. Bourgerie (1973) 9 Cal.3d 169, 173-175.)[1]

We should address any problem of loss suffered by governmental action as one demanding application of a rule of fairness. (Cf. Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211.) Although earlier cases have failed to apply the rule of fairness to losses occasioned by downzoning, there is no justification for treating such losses differently from those due to other governmental action.

As Justice Traynor in his concurring opinion in House v. L.A. County Flood Control Dist., *supra*, 25 Cal.2d 384, 396-397, correctly pointed out, in determining fairness "[i]t is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner [citations]."

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[1]"The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." (United States v. Fuller (1973) 409 U.S. 488, 490, also quoted in Southern California Edison Co. v. Bourgerie, *supra*, 9 Cal.3d at p. 175; see Midway Cabinet etc. Mfg. v. County of San Joaquin (1967) 257 Cal.App.2d 181, 192.)

In conjunction with the statement of Justice Traynor, the cautionary note of the United States Supreme Court in Pennsylvania Coal Co. v. Mahon, *supra,* 260 U.S. 393, 416, should not be overlooked. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The great harm which might result from downzoning was recognized in Metro Realty v. County of El Dorado (1963) 222 Cal.App.2d 508, 516, involving an ordinance of short duration. The court stated that although the temporary restriction was a mere inconvenience, "the same restriction indefinitely prolonged might possibly metamorphize into oppression."

Compensation in appropriate downzoning cases also meets the policy reflected by the eminent domain provision. As recently reaffirmed by this court in Holtz v. Superior Court (1970) 3 Cal.3d 296, 303, quoting from Clement v. State Reclamation Board (1950) 35 Cal.2d 628, "[T]he underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements' (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 350); 'to socialize the burden . . .—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society [citation].' "

Zoning is enacted for the public benefit. The need for "resolute sophistication in the case of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans

and improvements," was aptly stated by Professor Michelman in his well-noted law review article:[2] "What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized,' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all."

Not all governmental downzoning must be compensated. However, the compensatory "or damaged" provision of the California Constitution should apply when by public action land has (1) suffered substantial decrease in value, (2) the decrease is of long or potentially infinite duration and (3) the owner would incur more than his fair share of the financial burden.

Applying this fairness test to the instant factual situation, plaintiffs have stated a valid cause of action in inverse condemnation. The 80 percent decrease in value of plaintiffs' property—from a market value of $400,000 to $75,000—is obviously substantial. Because the action is taken pursuant to Government Code section 65300, this decrease clearly is of long duration.[3] Of the four quadrants of the subject intersection, three are zoned for commercial use and *only* plaintiffs' quadrant has been rezoned to "low-density

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[2]Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv.L.Rev. 1165, 1181.

[3]Section 65300 of the Government Code states: "Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, *long-term general plan* for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Italics added.)

single family residential." Plaintiffs therefore are being forced to shoulder a burden that surrounding landowners have not been made to share.[4]

Applying the tripartite test of fairness to downzoning should not impose an undue burden on governmental agencies. Once the landowner establishes his cause of action for damage, the condemning agency has several alternatives including: (1) compensating the landowner for the decrease in value; (2) paying total value for the land and acquiring title; (3) rescinding the downzoning, in which case the agency would be abandoning a condemnation, becoming liable to the landowner for interim damage, costs and attorney's fees. (Cf. Code Civ. Proc., § 1255a; City of Los Angeles v. Ricards (1973) 10 Cal.3d 385.) The first two alternatives assume the validity of the zoning ordinance and therefore are inapplicable when the ordinance itself is invalid.[5] In the case of an invalid ordinance, the court in issuing mandate should follow the third alternative, awarding interim damage, costs and attorney's fees.[6]

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[4]The facts of this case do not present a situation where the property was upzoned and then subsequently downzoned while in the hands of the same owner.

[5]Whether the present zoning classification of the property is valid has not yet been decided by the trial court or by this court, as that issue is not before us. However, previous California cases have held that land use regulation creating an island of residential use surrounded by less restrictively zoned property constituted an invalid exercise of the legislative power. (Hammer v. Town of Ross (1963) 59 Cal.2d 776; Reynold v. Barrett (1938) 12 Cal.2d 244.)

[6]Government Code section 818.2 providing that a public entity is not liable for injury caused by the enactment of

Plaintiffs have stated a cause of action in inverse condemnation. Therefore, it was error for the trial court to sustain the demurrer without leave to amend. Accordingly I would grant the writ directing the trial court to overrule the demurrer.

Clark, *J.*

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a law is inapplicable when the governmental action rises to the level of a taking or damaging within the eminent domain provisions of the Constitution.

EXHIBIT B.[1]

Complaint (Inverse Condemnation; Injunction; Declaratory Relief).

Superior Court of the State of California, for the County of Los Angeles.

HFH, Ltd., a Limited partnership, Plaintiff, vs. City of Cerritos, the City Council of the City of Cerritos, Barry A. Rabbitt, Frank D. Lee, Dennis G. Bradshaw, James S. Reddick, Robert J. Witt, Does One Through Ten, Inclusive, Defendants. No. C 57298.

Filed: May 15, 1973.

Plaintiff complains as follows:

FIRST CAUSE OF ACTION

1. Plaintiff is now, and at all times herein mentioned was, a limited partnership.

2. Defendant CITY OF CERRITOS is now, and at all times herein mentioned was, a municipal corporation duly organized and existing under and by virtue of a charter adopted pursuant to the Constitution and laws of the State of California.

3. At all times herein mentioned, Defendant CITY COUNCIL OF THE CITY OF CERRITOS was, and now is, a duly constituted elected body of said Defendant CITY OF CERRITOS, consisting of the individual Defendants BARRY A. RABBITT, Mayor, FRANK D. LEE, Mayor Pro Tem, DENNIS G. BRADSHAW, Councilman, JAMES S. REDDICK, Councilman and ROBERT J. WITT, Councilman. At all said times, Defendant CITY COUNCIL was, and now is, charged

[1]An identical complaint was filed on behalf of Vons Grocery Co., Inc. It is not included in the interest of avoiding unnecessary printing expense.

with the duty, among others, of enacting ordinances dividing the City or portions thereof into zoning districts according to location of uses of private real property deemed to best preserve and promote the public health, safety, morals, and general welfare. At all times herein mentioned, said Defendants, and each of them, were charged with the duty of preparing and administering a General Plan for the City of Cerritos.

4. Defendants DOE ONE through DOE TEN, Inclusive, have acted in a capacity of officials, agents, employees or representatives of Defendant CITY OF CERRITOS, in connection with the acts hereinafter set forth. The true names or capacities, whether individual, corporate, associate, or otherwise, of the Defendants DOE ONE through DOE TEN, Inclusive, are unknown to Plaintiff who therefore sue said Defendants by such fictitious names and will ask leave of Court to amend this Complaint to show their true names and capacities when same have been ascertained.

5. Plaintiff is now, and since the year 1966 has been, the owner of two separate parcels of real property, together consisting of approximately 3.60 acres (hereinafter sometimes referred to as the "subject properties"), situated in the City of Cerritos, County of Los Angeles, State of California, and located generally at the northeast corner of Carmenita Street and South Street in said City. The legal description of said properties is set forth on Exhibit "A" attached hereto and by reference made a part hereof.

6. In the latter part of the year 1965 or the early part of 1966, the City Council of the City of Cerritos, upon recommendation of the Planning Commission, enacted an ordinance classifying the said prop-

erties, together with a certain adjacent property consisting of an additional 2.7 acres more or less, as Zone C-2 which zone permitted general commercial uses including shopping center uses. The combined total area of Plaintiff's properties and the adjacent properties was 5.87 acres, more or less.

7. Prior to the enactment of said ordinance classifying said properties Zone C-2, the entire 5.87 (then unimproved and zoned for agricultural uses) was owned by one Robert Grant. Said Grant entered into an agreement with Von's Grocery Company wherein and whereby 2.7 acres more or less of said property was to be conveyed to Von's Grocery Company upon condition that the entire 5.87 acres would be rezoned to C-2 to permit development and use of all of said properties for shopping center and related commercial purposes. At the same time, said Grant entered into an agreement with Von's Grocery Company wherein and whereby the property to be retained by Grant, together with the property to be sold to Von's Grocery Company, would be committed to a joint commercial development project, all of which was well known to Defendants.

8. In or around the early part of 1966, the subject properties, together with the adjacent 2.7 acres sold to Von's Grocery Company, were the subject of a parcel map submitted to Defendant CITY OF CERRITOS. Said Defendant approved the said parcel map which caused the subject properties and the adjacent property to be parceled in such a manner that they could only be used as a part of an integrated shopping center development in accordance with the aforementioned contractual arrangements.

9. Plaintiff, in reliance on the actions of the Defendant CITY OF CERRITOS zoning the aforementioned properties for commercial use and approving a parcel map which parceled the subject properties in such a manner as to make it useful only for development for commercial uses in conjunction with said adjacent property, purchased the subject properties from said Robert Grant for the sum of $238,000.

10. Plaintiff assumed all the rights and obligations of the seller, including the contractual obligations to develop the subject properties for shopping center purposes in conjunction with Von's Grocery Company.

11. In or about July, 1971, Defendants declared a moratorium with respect to the use of certain properties and zone categories for the alleged purpose of restudying land use policies. The subject properties and the related adjacent property were temporarily reclassified A-2 (agricultural).

12. In October of 1971 Defendants adopted a revised General Plan clearly showing that the subject properties, or at least a substantial portion of it, was designated for neighborhood commercial uses.

13. In the latter part of 1971, Plaintiff, together with Von's Grocery Co., the owner of the adjacent parcel, agreed that their respective contractual relationships would be satisfied by a joint sale of their respective properties to a third party. In the early part of 1972, Plaintiff, together with said Von's Grocery Company, entered into an agreement with Diversified Associates, Inc. wherein and whereby said Diversified Associates, Inc. (hereinafter sometimes referred to as "purchaser") was to purchase the subject properties, together with

the properties owned by Von's Grocery Company, for a total sum of $400,000, of which the sum of $250,000 was to be paid to Plaintiff. Said agreement, however, was contingent upon the subject properties remaining available for commercial use in accordance with its then permanent zoning and in accordance with the General Plan.

14. Plaintiff, in conjunction with the purchaser and Von's Grocery Company, presented several plans of development of the subject properties to staff personnel of the Defendant CITY, and were led to believe by said staff personnel that the proposed commercial use would be acceptable provided certain minor modifications of the proposed plans were made. Said plans were modified in accordance with the suggestions of said staff personnel.

15. Thereafter, Plaintiff, in conjunction with the purchaser and Von's Grocery Company, made application to Defendant CITY in accordance with procedures established by said Defendant to reinstate the permanent commercial zoning on the subject properties and adjacent property. Simultaneously, a precise plan of commercial development was submitted to Defendants.

16. On or about July 26, 1972, the applications above referred to were heard by the Planning Commission of the City of Cerritos. Said Planning Commission recommended denial of the reinstatement of the permanent commercial zoning on the subject properties and the adjacent property, and instead recommended rezoning of the subject properties and the adjacent property to a permanent classification of RS-6500 (low density single family residential). At the

same time, said Planning Commission recommended denial of the proposed precise plan of development.

17. Simultaneously with the action taken on July 26, 1972 as to the subject properties, said Planning Commission also considered applications for permanent classification of the other quadrants of the same intersection within the jurisdiction of the Defendant CITY OF CERRITOS. (One quadrant of said intersection, the southeast corner, is situated in the City of La Palma, Orange County—but is devoted to commercial use.)

18. With respect to the other quadrants of the same intersection, said Planning Commission recommended commercial zoning, resulting in Plaintiff's properties being the only one of the properties of the four quadrants of the intersection relegated to low density single family residential use.

19. Thereafter, on September 6, 1972, Plaintiff in conjunction with the purchaser and Von's Grocery Company, appealed the actions of the Planning Commission to the Defendant CITY COUNCIL. On said date, the said CITY COUNCIL denied Plaintiff's appeal. (The actions relating to Plaintiff's properties were taken under City of Cerritos file numbers ZC (IDP) 72-18 and PP(IDP) 72-18. Simultaneously, said Defendant CITY COUNCIL approved the grant of commercial zoning to the similarly situated properties at the northwest and southwest quadrants of the same intersection, under City of Cerritos file numbers ZC (IDP) 72-21 and ZC(IDP) 72-24, respectively.)

20. On or about April 6, 1973, at a hearing before Defendant CITY COUNCIL, Plaintiff requested reconsideration of the matter of zoning of the subject

BLEED THROUGH

properties. Defendants denied the request and at some time in the month of April, 1973, permanently rezoned the subject properties and related adjacent property to RS-6500, which said zone category limits the properties to only single family residential uses.

21. The size, shape, location and other physical factors relating to the subject properties as well as the character of the surrounding uses render Plaintiff's properties useless for single family residential purposes. As a direct and proximate result of the aforementioned actions taken by Defendants, Plaintiff has been deprived of any reasonably beneficial use of its said properties commensurate with their value.

22. Defendants' actions are contrary to the General Plan of the City of Cerritos as it existed on September 6, 1972, and thus in direct violation of the Municipal Code of the City of Cerritos which requires that zoning ordinances be consistent with the General Plan.

23. Plaintiff is informed and believes, and on the basis of such information and belief, alleges that Defendants failed to prepare an Environmental Impact Report as required by section 21080(a) of the Public Resources Code.

24. Plaintiff has exhausted its administrative remedies and has filed a claim with Defendant CITY prior to instituting this suit.

25. Plaintiff has incurred, and will continue to incur, expenses for legal services in prosecuting this action.

26. Plaintiff is informed and believes, and on the basis of such information and belief alleges that the fair market value of its properties prior to the actions

taken by Defendants was in excess of $250,000. By reason of the actions taken by Defendants as aforementioned, Plaintiff's said real properties have been taken or damaged for a public use. Plaintiff is informed and believes, and on the basis of such information and belief alleges that as a result of the aforementioned actions of the Defendants, Plaintiff's property now has a fair market value of only $50,000, resulting in a diminution in value and damage to Plaintiff of $200,000.

SECOND CAUSE OF ACTION.

1. Plaintiff realleges and incorporates herein by reference each and every allegation contained in the First Cause of Action hereinabove set forth.

2. Defendants threatened to, and unless restrained, will continue indefinitely to enforce the ordinance purporting to reclassify Plaintiff's properties to Zone RS-6500. At the same time, Defendants threatened to, and unless restrained, will continue to permit commercial uses of other similarly situated parcels at the northwest and southwest corners, respectively, of the intersection of Carmenita and South Streets.

3. These actions, and threatened actions, of Defendants will cause irreparable injury to Plaintiff for which Plaintiff has no adequate remedy at law.

THIRD CAUSE OF ACTION

1. Plaintiff realleges and incorporates herein by reference each and every allegation of the First Cause of Action hereinabove set forth.

2. An actual controversy exists between Plaintiff and Defendants in which Plaintiff contends:

(a) That the ordinance of Defendant CITY OF CERRITOS purporting to reclassify Plaintiff's real properties from C-2 (commercial) to RS-6500 (single family residential) is unconstitutional and void in that it has no reasonable relation to the public health, safety, morals or general welfare.

(b) That said ordinance is unconstitutional and void as to Plaintiff in that the purported rezoning thereby attempts to deprive Plaintiff of valuable property rights on a mere pretext without justification or just compensation.

(c) That said ordinance is unconstitutional and void as to Plaintiff in that it is discriminatory, arbitrary and unreasonable.

(d) That the ordinance or ordinances purported to classify or reclassify similarly situated parcels of real property at the intersection of Carmenita and South Streets in the City of Cerritos are unconstitutional and void in that they have no reasonable relation to the public health, safety, morals, or general welfare.

(e) That the ordinance purporting to reclassify Plaintiff's said real properties is void as being contrary to and inconsistent with the General Plans of the City of Cerritos.

(f) That the ordinance purporting to reclassify Plaintiff's properties as well as the properties similarly situated at the same intersection are void in that no Environmental Impact Report was prepared as required by the Environmental Quality Act of the Public Resources Code.

3. Plaintiff is informed and believes and on such information and belief alleges that with respect to

the allegations of Paragraph 2 of this Third Cause of Action, Defendants contend in all respects to the contrary.

WHEREFORE, Plaintiff prays as follows:

1. That the Court determine and declare that Plaintiff's properties have been taken or damaged for public use and that the Plaintiff has been damaged in the sum of $200,000, together with interest thereon as provided by law.

2. A temporary restraining order, preliminary injunction and permanent injunction be issued restraining Defendants, and each of them, from enforcing the ordinance restricting the use of Plaintiff's properties to a single family residential use and further prohibiting Defendants, and each of them, from any action permitting similarly situated properties at the intersection of Carmenita and South Streets in the City of Cerritos to be used for commercial purposes;

3. A judgment declaring that the ordinance or ordinances purporting to restrict the use of Plaintiff's real properties to single family residential use and permitting similarly situated properties at the same intersection to enjoy commercial use are unconstitutional and invalid;

4. For costs of suit, including reasonable attorney's fees; and

5. For such other relief as the Court deems proper.

OLIVER, STOEVER & LASKIN
By /s/ Richard Laskin
Attorneys for Plaintiff HFH, LTD.,
a Limited Partnership

EXHIBIT "A".

GETZ FEE OWNERSHIP

Parcel "G" (Lower)

That portion of the southwest quarter of Section 33, Township 3 South, Range 11 West, in the Rancho Los Coyotes, in the city of Dairy Valley, county of Los Angeles, state of California, as shown upon a map recorded in book 41819 pages 141 et seq., of Official Records, in the office of the county recorder of said county, described as follows:

Beginning at the southwest corner of said southwest quarter; thence North 89° 27′ 12″ East, along the southerly line of said section, a distance of 300.00 feet; thence North 0° 32′ 48″ West, at right angles to said southerly line, 50.00 feet to the true point of beginning; thence North 0° 32′ 48″ West, at right angles to said southerly line, 215.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 110.00 feet; thence South 0° 32′ 48″ East 215.00 feet to a line that is parallel with said southerly line and passes through the true point of beginning, thence easterly, along said parallel line, 110.00 feet to the true point of beginning.

(Parcel G (upper)

That portion of the southwest quarter of Section 33, Township 3 South, Range 11 West, in the Rancho Los Coyotes, in the city of Dairy Valley, county of Los Angeles, state of California, as shown upon a

map recorded in book 41819 pages 141 et seq., of Official Records, in the office of the county recorder of said county, described as follows:

Beginning at the southwest corner of said southwest quarter; thence North 89° 27′ 12″ East, along the southerly line of said section, a distance of 360.00 feet; thence North 0° 32′ 48″ West, at right angles, to said southerly line, 525.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 55.00 feet to the true point of beginning; thence South 0° 32′ 48″ East, at right angles to said southerly line, 100.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 80.00 feet; thence North 0° 32′ 48″ West, at right angles to said southerly line, 260.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 100.00 feet; thence North 0° 32′ 48″ West, at right angles to said southerly line, 100.00 feet; thence North 89° 27′ 12″ East, parallel with said southerly line, 210.00 feet; thence South 0° 32′ 48″ East, at right angles to said southerly line, 100.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 30.00 feet; thence South 0° 32′ 48″ East 160.00 feet to the true point of beginning.

(Parcel G-1)

That portion of the southwest quarter of Section 33, Township 3 South, Range 11 West, in the Rancho Los Coyotes, city of Dairy Valley, county of Los Angeles, state of California, as shown upon a map

recorded in book 41819 pages 141 et seq., of Official Records, in the office of the county recorder of said county, described as follows:

Beginning at a point in the southerly line of said section distant North 89° 27′ 12″ East thereon 250.00 feet from the southwesterly corner of said section; thence North 0° 32′ 48″ West, at right angles to the southerly line of said section, 265.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 25.00 feet; thence North 0° 32′ 48″ West, at right angles to said southerly line, 160.00 feet to the true point of beginning; thence continuing North 0° 32′ 48″ West, at right angles to said southerly line, 260.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, 100.00 feet; thence North 0° 32′ 48″ West at right angles, to said southerly line, 100.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, to the easterly line of the westerly 50.00 feet of said section; thence southerly, along said easterly line, to a line that is parallel with the southerly line of said section and passes through the true point of beginning; thence North 89° 27′ 12″ East, along said parallel line, to the true point of beginning.

(Parcel G-2)

That portion of the southwest quarter of Section 33, Township 3 South, Range 11 West, in the Rancho Los Coyotes, in the city of Dairy Valley, county of Los Angeles, state of California, as shown upon a

map recorded in book 41819 pages 141 et seq., of Official Records, in the office of the county recorder of said county, described as follows:

Beginning at a point in the southerly line of said section distant North 89° 27′ 12″ East, along said southerly line, 250.00 feet from the southwesterly corner of said section; thence North 0° 32′ 48″ West, at right angles, to said southerly line, 50 feet to the true point of beginning; thence North 0° 32′ 48″ West, at right angles, to said southerly line, 210.00 feet; thence South 89° 27′ 12″ West, parallel with said southerly line, to the easterly line of the westerly 50.00 feet of said section; thence southerly, along said easterly line, 60.00 feet; thence North 89° 27′ 12″ East, parallel with said southerly line, 125.00 feet; thence South 0° 32′ 48″ East at right angles to said southerly line, to the northerly line of the southerly 50.00 feet of said section; thence North 89° 27′ 12″ East, along said northerly line, to the true point of beginning.

EXHIBIT C.

October 30, 1975

Honorable Chief Justice
Honorable Associate Justices
Supreme Court, State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

Re: HFH Limited & Vons Grocery Company, Inc. vs. Superior Court
L.A. Nos. 30382 and 30383

Dear Mr. Chief Justice and Honorable Associate Justices:

Petitioners, HFH Limited and Vons Grocery Company respectfully submit this letter as a means of calling the Court's attention to several important cases which have been decided since the date of oral argument. Additionally, Petitioners' wish to bring the Court's attention the fact that building permits have been issued for the construction of a neighborhood shopping center, including a supermarket, on a parcel immediately across the street from the Petitioners' property. Thus, in this case, even if a writ of mandate issues, and the City ultimately rezones the subject property to commercial uses, such equitable relief will be meaningless.

The subject intersection now has a neighborhood shopping center, and Petitioners' parcel is permanently deprived of its value as a commercially developable parcel.

Of particular interest are three recent cases, two of which arose in California. In each case, a Court ruled that the owner of private property could maintain

an action for inverse condemnation resulting from unnecessarily restricted land use regulations.

Throughout oral argument, Petitioners and several amici insisted that State Courts must assume responsibility for compensating the misuse of land use regulatory schemes because failure to do so would cause litigants to simply "walk across the street" to seek relief in the Federal Courts.

In *M. J. Brock & Sons, Inc. vs. City of Davis,* (N.D. California No. CS-74-364SW opinion filed August 26, 1975,) the Federal District Court for the Northern District of California refused to abstain from deciding a claim based upon the just compensation clause of the Fifth and Fourteenth Amendments of the United States Constitution.

Like the Petitioners herein, the Plaintiff *M. J. Brock* had received positive incentives to proceed with plans for development of its property. Then, rather suddenly, the Defendant City placed the subject property in an "S" zone while it studied the future uses of the property. Ultimately, the property was downzoned from "Planned Development" to a zone which essentially prohibited development for an extended period of time.

In refusing to abstain from exercising Federal jurisdiction, the Court observed:

> "A Federal Court cannot channel federal constitutional issues to State Courts merely to avoid a federal decision." (Slip Opinion, Page No. 4).
>
> * * * * *
>
> "It is true that a local land use regulatory scheme is the subject of concern here, but the exercise of federal court jurisdiction by no means

> constitutes unnecessary interference because the federal questions of taking, deprivation of civil rights and a conspiracy to abrogate plaintiff's civil rights are at the center of this suit." (Slip Opinion, Page No. 4-5).

Given the decisions of *Arastra vs. City of Palo Alto,* (see letter of Amicus Curiae Arastra Limited Partnership, dated September 6, 1975), and now the decision in *M. J. Brock,* it is apparent that the Federal Courts are opening their doors to such cases, and unless adequate State remedies are formulated, property owners will simply seek redress in the Federal Courts.

The second case of importance was decided by Division One of the First Appellate District of the State of California. In *Eldridge vs. City of Palo Alto,* (1 Civ. 33517, Opinion filed September 26, 1975), the Court faced the issue of whether or not land use regulations which classify 750 acres of vacant property to open space and conservation categories could ground a cause of action for inverse condemnation or "de facto taking." A demurrer was sustained, without leave to amend, in the Trial Court, and an appeal taken from the Judgment of Dismissal.

While the opinion of the Court of Appeal is obviously not binding upon this honorable Court, the reasoning of the majority in reaching its decision in *Eldridge* is particularly persuasive, and Petitioners beg the Court's indulgence to quote a considerable portion therefrom.

Of particular importance is the formulation of a standard which tests the "reasonableness" of a zoning regulation by ascertaining the magnitude of its economic effect upon the property owner. In confronting this issue, the Court of Appeal concluded that:

> "Whether a zoning restriction is so 'arbitrary' or 'unreasonable' or 'burdensome' or 'economically infeasible' or 'beyond proper bounds in its invasion of property rights' *as to amount to an inverse condemnation taking,* is ordinarily *a question of fact to be determined by trial of the issue, and not by demurrer.*" (Citations omitted.)
>
> * * * * *
>
> "Among the many *factual issues* which might be resolved in a trial of the case before us is the '*economic feasibility*' of the ten acre home sites, whether such home sites are consistent with the proposed use of the foothills for 'open space conservation and/or parks' the extent of the intrusion upon plaintiff's property of the 'paths and trails system' planned to 'allow public access through the foothill lands,' and generally the impact on plaintiff's property of the zoning ordinances requirement that the foothills remain 'open space,' available for 'public recreation.' " (Citations Omitted.) (Slip Opinion, Page No. 15-16).

In reaching its decision that "economic feasibility" was a factor which must be considered, the *Eldridge* court relied upon *Town of Hempstead v. Lynne,* (1961) 222 N.Y. Supp. 2d 526, a case of which Petitioner was unaware until reading the *Eldridge* opinion. That

case sets forth, in succinct form, the necessity for including a requirement that land use regulations be "economically reasonable" in order to be "reasonable" as a matter of regulatory law.

In *Lynne,* the New York Court determined that:

> "Economic feasibility would appear to be one of the vital elements to be considered. . . . Where, . . . in addition to loss of most profitable use, and in addition to actual loss of profits under a contract, an owner of property is compelled by an ordinance either to leave the land vacant for the indefinite future, or develop it for the more restricted use at a substantial loss of his actual investment, the land cannot be said to be 'reasonably adapted' to the use and the ordinance may be held confiscatory."
>
> . . .
>
> "The owner's right of user here is so limited by the restrictive ordinance that there is, in reality, an *economic taking* of his property, even though he is left with title, possession and a possibility of use for the restricted purpose. The amendment is thus confiscatory in that it precludes the use of the property for any purpose to which it is reasonably or economically adapted." (Emphasis in original.)

While obviously not binding upon this honorable Court, this reasoning is overwhelming, and readily applicable to the case at bar. Petitioners' have property which was initially valued at $400,000.00, and after the application of arbitrary land use regulations was

valued at less than $75,000. There is certainly nothing "economically reasonable" about this categorization. Petitioners urge that the reasoning in *Eldridge* and *Lynne* is overwhelming and should be considered by this Court.

The third significant case is *Keystone Associates vs. State* (Opinion filed July 23, 1975) 371 N.Y. Supp. 2d 814. As the Court is aware, this is the third reported "Keystone Associates case" and is one of a long line of cases involving the same litigation.

In *Keystone,* the purchasers of property were inhibited from developing in accordance with their plans by a State Historical Commission which was later declared to be unconstitutional (*Keystone Associates vs. Moerdler,* 19 N.Y.2d 78). *Keystone* subsequently brought suit for the damages which were incurred as a result of the delay imposed by the Commission.

Specifically, they sought compensation for the increased cost of construction and the loss of profits from the building which they were not able to complete.

In reviewing the entire matter of the extended delay imposed upon the property owners, the Court of Claims observed:

> "The foreseeable and certain effect of the delay to which *Keystone* was subjected was the increased of construction and its loss of profit from the completed building for the period of the delay in its completion. This Court believes that a measure of damages relating to such increased cost and loss of profit must be applied to carry out the clearly apparent intent of the Court of Appeals as to an appropriate measure of damages." 371 N.Y. Supp. 2d 814, 820.

Additionally, the Court compensated *Keystone* for attorneys fees and related legal expenses incidental to the litigation.

The award of these items is particularly significant, because, these are precisely the items of damage which Petitioners itemized in their supplemental brief on interim damages. (See Supplemental Brief, Pages No. 16-17).

Finally, if there is any question about the damage which has occurred as a result of the delay, and the futility of any equitable relief herein, that doubt is dispelled by the fact that permits have been issued for the construction of a neighborhood shopping center on a parcel immediately across the street from the subject property. As Exhibits* "A" through "F" attached hereto indicate, a shopping center, including a supermarket will soon be completed. It now appears that the intersection upon which Petitioners' property is located will have a competing facility open years before Petitioners could possibly open a facility of their own. Even if they were given commercial zoning today, they could not hope to develop the property in time to be competitive.

If the zoning applied to Petitioners' property is, as they allege, illegal and voidable, a simple restoration of legitimate zoning classification will not make these property owners whole, and compensation for the interim losses they have incurred is necessary to formulate any judicial relief worth giving them.

---

*Petitioners respectfully request that the Court take judicial notice of these Exhibits pursuant to Evidence Code, Sections 452-453.

Petitioners respectfully apologize for the length of this letter, but the passage of time, and the substantial change in circumstances, has made its length necessary.

Your indulgence in receiving this rather lengthy letter is greatly appreciated.

Very truly yours,

TELANOFF, BOBROWSKY, WALLIN & DILKES
BY C. Edward Dilkes
OLIVER, STOEVER & LASKIN
By Richard Laskin

CED/lkk
Attachments
cc: (See Attached list)

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1129

H.S.H., Ltd., *Petitioner*,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

THE CITY OF CERRITOS, et al.,
Real Parties in Interest.

VON'S GROCERY COMPANY, *Petitioner*,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

THE CITY OF CERRITOS, et al.,
Real Parties in Interest.

On Petition for Writ of Certiorari to the
Supreme Court of the State of California

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No.

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vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
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and

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On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

BLEED THROUGH

OPINION BELOW

The Supreme Court of the State of California, in an opinion reported at 15 Cal. 3d 508 (1975), reversed the decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, and held, *inter alia,* that inverse condemnation does not lie in zoning actions where the damage alleged can be deemed a reduction in market value of real property, even though the reduction in value could be severe. A demurrer to the count of the complaint sounding in inverse condemnation was thus sustained without leave to amend.

INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

Pursuant to Rule 42, Rules of the Supreme Court of the United States, this brief is filed with the written consent of both the attorneys for the petitioners and the attorneys for the respondents. Letters indicating such consent have been filed with the Clerk of the Court.

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Foundation is set by a seventeen-member Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only

where the Foundation's position has broad support within the general community.

Among those legal questions with which the Foundation has been concerned since its inception is the proper application of the law in controlling the use of privately owned land. The Foundation is particularly concerned that there be legal remedies available to effect a fair and just result when, through the attempted exercise of the police power, there is a substantial impairment in the use of land. Such concern prompted the Pacific Legal Foundation to participate as *amicus curiae* in the proceedings below.

The opinion of the California Supreme Court in this case gives the Foundation cause for concern for several reasons. The court held, in sum, that a cause of action in inverse condemnation does not lie for zoning actions in which the complaint alleges "mere" reduction in market value. In reaching its holding, the California court misconstrues this Court's opinion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and ignores the controlling precedent established by this Court in the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The omission and misplaced reliance are disturbing in that the court was evaluating the case in terms of the state *and* federal constitutional provisions.[1]

More disturbing than the aforementioned deficiencies is the substantial void in the equity of California law that the state court decision creates. The

[1] *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 511 (1975).

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property owner is left without an effective remedy when, through a regulatory act, he has been forced to contribute more than his proper share to an undertaking that is presumably for the benefit of the public. Such a situation is patently unfair.

It is the extreme hardships that can result from the state court's decision which lead the Pacific Legal Foundation to present the following arguments in support of the Petition for Writ of Certiorari in this matter.

INTRODUCTION

In order to place the argument of *amicus* in its proper perspective, a brief description of the facts of the case, taken from the California court's opinion, will follow.[2]

Petitioners entered into an agreement whereby the purchase of the property in question was made contingent upon rezoning to commercial use. Following submission of a parcel map to the respondent city in 1966, the property was parceled in such a manner that it could be used only as a part of an integrated shopping center development. The city rezoned the property for commercial use and approved the map. Paying $388,000, petitioners thus acquired property which was located in one of four quadrants at an intersection and which was zoned for commercial use for the specific purpose of erecting an integrated shopping center.

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[2] *HFH, Ltd. v. Superior Court, supra* n.1, at 511-512.

In 1971 the property was temporarily reclassified agricultural pursuant to a moratorium during which land use policies were to be restudied. Later that year, the city adopted a general plan indicating that some of the land in the area of petitioners' property was appropriate for commercial use, but did not alter the agricultural classification of petitioners' property. Thereafter, plaintiffs submitted to the city plans for the development of the property as previously contemplated, together with a request that the zoning be reinstated to commercial.

In 1972 the city rejected petitioners' shopping center development proposal and rezoned the property to low density, single family residential use. It should be noted that each of the other three quadrants of the intersection were either zoned for commercial use or were currently being used for commercial purposes.

The size, shape, location and other physical factors relating to the subject property, as well as the character of the surrounding uses, allegedly rendered petitioners' property useless for single family residential purposes. It was alleged that as the direct and proximate result of the respondent city's actions, petitioners' property, which was allegedly valued at $388,000 under commercial zoning, was reduced to a market value of $75,000 under residential zoning.[3]

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[3] *HFH, Ltd. v. Superior Court, supra* n.1, at 512.

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ARGUMENT

THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE CONTROLLING PRECEDENT ESTABLISHED BY THIS COURT IN PENNSLYVANIA COAL CO. v. MAHON AND THIS COURT'S ANALYSIS IN NECTOW v. CAMBRIDGE

In essence, the message of the California Supreme Court to property owners is this: even if one alleges a denial of all practical use of property causing a severe diminution in value as a result of regulatory action, that demonstration alone is not enough to state a cause of action in inverse condemnation. In so-stating, the court radically departs from this Court's decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

If the property owner is the victim of a *physical* appropriation of property in the public interest, there is no difficulty in upholding a remedy in inverse condemnation under both the Federal and State Constitutions. If an owner is the victim of an arbitrary and capricious or discriminatory act which purports to be in the public interest, or one related to a legitimate end, again there is no problem in maintaining an action in mandamus. Where, however, he is the victim of a regulatory act which is arguably in the public interest, serves a legitimate purpose, is implemented by proper procedure, but which grievously damages him because the economic burden and denial of the use of his property generated by the regulatory act falls on him alone, he is, in light of the state court's decision, *without* an effective remedy.

In reaching this result, the California Supreme Court relies, *inter alia,* on this Court's decision in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). The state supreme court states that *Euclid,* over fifty years ago, settled the issue of whether inverse condemnation will lie in zoning actions in which the complaint alleges "mere" reduction in value.[4] It must be kept in mind that the *Euclid* decision contains no language to suggest that just compensation was sought by appellees under a theory of inverse condemnation or taking. Neither the words "eminent domain" nor "just compensation" appear anywhere in the decision.[5]

The opinion of this Court in its entirety is a consideration of the right of the City of Euclid to enact a general comprehensive zoning ordinance under its police powers. It does not discuss the separate and distinct question as to how the burdens caused by such zoning are to be distributed. To the extent that the state supreme court relies on *Euclid* as controlling and an overwhelming precedent for denying the property owner a remedy where a severe diminution in property value is suffered as a result of valid regulatory activity, it is in error. The question posed to the California court was not one of the *power* to zone, as in *Euclid,* but whether an action exists in in-

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[4] *HFH, Ltd. v. Superior Court, supra* n.1, at 514-515.

[5] This fact was pointed out to the state supreme court by M. Reed Hunter for the firm of Goldstein, Barcelow and Goldstein, Pacht, Ross, Warne, Bernhard & Sears in a letter dated November 26, 1975 in support of the Petition for Rehearing. The Petition for Rehearing was subsequently denied.

verse condemnation when, through the exercise of the zoning authority to promote some public purpose, a severe economic burden is imposed on a single property owner.

It is curious that the court chose to refer to *Euclid* but ignored *Pennsylvania Coal Co. v. Mahon, supra,* in reaching its decision. In *Pennsylvania Coal Co. v. Mahon, supra,* this Court established the principle that government regulatory action can so diminish the value of property as to constitute a taking of that property and thus require the payment of just compensation. In *Pennsylvania Coal Co.,* the Court considered a statute that made it commercially impracticable to mine certain types of coal. This Court stated:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon, supra* at 415.

Pennsylvania Coal Co. sets forth the permanent diminution in value test in determining the validity of traditional Euclidean-type zoning. The decision stands for the proposition that where an ordinance seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose, it must be recognized as effecting a taking for which compensation is required. *Pennsylvania Coal Co.* thus, unlike *Euclid v. Ambler Realty Co.,* does not focus on a consideration of whether a municipality may zone under its police powers, but the separate

and distinct question as to how the burdens caused by such zoning are to be distributed, which is the fundamental question in this matter.

The economic considerations pertinent to the *Pennsylvania Coal Co.* determination were also relevant to this Court's decision in *Nectow v. Cambridge,* 277 U.S. 183 (1928). In *Nectow,* the plaintiff's property had been zoned by the City of Cambridge for residential use. The property bordered the Ford Motor Company and a soap factory. In addition, railroad tracks of the Boston and Albany Railroad were nearby *(Nectow v. Cambridge, supra* at 185). Plaintiff filed a suit seeking a mandatory injunction requiring the city to consider his application for a building permit without regard to the provisions of the zoning ordinance. Plaintiff challenged the ordinance on the grounds that it deprived him of his property without due process of law in contravention of the Fourteenth Amendment *(Nectow v. Cambridge, supra* at 185). A master appointed in the case found that:

> "'[N]o practical use can be made of the land in question for residential purposes, *because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property.'" Nectow v. Cambridge, supra* at 187 (emphasis added).

This Court then stated:

> "It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are

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> zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance." *Nectow v. Cambridge, supra* at 187.

This Court weighed the argument of the municipality regarding the general welfare as against the "serious and highly injurious" invasion of plaintiff's property and concluded that "the action of the zoning authority comes within the ban of the Fourteenth Amendment and cannot be sustained." *Nectow v. Cambridge, supra* at 188-189.

Nectow is instructive in that it holds that the zoning power cannot be exercised so as to impose upon a piece of land a use limitation which renders the land *economically* unusable. Second, in confrontations between the police power and a private claim of taking *Nectow* requires a consideration of the reasonableness of the zoning scheme as balanced against the injury sustained. These determinations can only be made after a trial. In this case it is useful to keep in mind that the City of Cerritos downzoned plaintiff's five acre parcel to low density residential use. The parcel is located at a street intersection where three of the corners are already devoted to commercial uses. Plaintiffs have alleged that their property has suffered a severe reduction in value as a result of this rezoning. The facts pleaded alleged that petitioners were deprived of all reasonable economic use of their property consistent with the residential zoning.

In the situation outlined above, this Court, in *Pennsylvania Coal Co.,* has advocated a case-by-case

approach to determine whether compensation is required. This Court stated:

> "When it [the diminution in value] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.* The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co. v. Mahon, supra* at 413 (emphasis added).

In light of these statements, there can be no doubt that this Court intended that the owner of property which suffers a severe diminution in value through regulatory governmental action be able to present to the trier of fact his proof that a taking has occurred. The California Supreme Court rejects this approach in the instant case and limits the petitioners to an action in mandate without any potential for an award of damages. In so ruling, the state court ignores the holding in *Pennsylvania Coal Co., supra.*

CONCLUSION

It is respectfully urged that a writ of certiorari be granted herein for the reason that the decision rendered by the Supreme Court of California leaves a substantial void in the equity of California law. In the instant case a severe diminution in value of that property has been brought about by the exercise of

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the zoning power. The state supreme court has denied petitioners here the opportunity for a trial and even the opportunity to amend their complaint to state the best cause of action possible. The state supreme court responds to the plight of the petitioners by saying that their remedy, if any, lies in mandamus. In so holding, the state court denies petitioners the opportunity for just compensation on the basis of the alleged nonphysical taking of their property. Moreover, the state court decision conflicts with this Court's controlling decisions in *Pennsylvania Coal Co. v. Mahon, supra,* and *Nectow v. Cambridge, supra.*

The state court decision, thus, is of great and far-reaching public consequence and deserving of this Court's attention.

Dated, February 6, 1976.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAR 9 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1129

SFEI, LTD.,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

and

THE CITY OF CERRITOS, *et al.*,

Real Parties in Interest.

VONS GROCERY COMPANY,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

and

THE CITY OF CERRITOS, *et al.*,

Real Parties in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

---

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1129

HFH, LTD.,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

and

THE CITY OF CERRITOS, *et al.*,

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VON'S GROCERY COMPANY,

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THE SUPERIOR COURT OF LOS ANGELES COUNTY,

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and

THE CITY OF CERRITOS, *et al.*,

Real Parties in Interest.

On Petition for Writ of Certiorari to the California Supreme Court.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION.

Preliminary Statement.

This case finds itself before this Honorable Court, even before Real Parties in Interest have had the

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opportunity to file their Answer to the allegations of Petitioners' Complaint. The issues raised herein deal not with what Petitioners must prove as plaintiffs below in order to prevail, but rather assume *ex hypothesi* such proof and demand as relief, remedies which neither this Court, nor the California Supreme Court, nor any other Court of which counsel have knowledge, has ever determined to be constitutionally required.

Opinion Below.

The opinion of the California Supreme Court which Petitioners seek to challenge herein is essentially as is set forth in Exhibit "A" to the Petition for Writ of Certiorari on file herein. For the sake of accuracy, it should be noted, however, that the California Supreme Court did, on December 24, 1975, modify said opinion, at 15 Cal. 2d 837a, in certain respects not pertinent herein. The modification is set out in Exhibit "A" to this Brief so that the Court may be fully advised of the decision of the California Supreme Court.

Jurisdiction.

Real Parties in Interest do not challenge the jurisdiction of the Court under Title 28 U.S.C. §1257(3), but do question the accuracy of Petitioners' assertion of jurisdiction under 28 U.S.C. §1257(2) in that the validity of California Government Code Section 818.2, which provides,

> "[A] public entity is not liable for an injury caused by adopting or failing to adopt an enactment."

was not drawn in question "on the ground of it being repugnant to the Constitution, treaties, or laws of the United States", nor on any other ground whatsoever.

Questions Presented for Review.

The Petition for Certiorari sets out the two issues Petitioners claim are raised by the decision below; in fact, it does so twice—at pages 2-3 in the "Preliminary Statement", and again at pages 3-4 as "Questions Presented for Review"—and each statement of the issues is sufficiently different from the other as to confuse the question of exactly what issues Petitioners are claiming herein.

In an effort at clarity then, Real Parties in Interest restate the two issues attempted to be raised by Petitioners herein as follows:

(1) If a *valid* zoning regulation results in a diminution of property value, is the property owner entitled, under the Fifth and Fourteenth Amendments to the United States Constitution, to be compensated for his loss?

(2) If a zoning regulation prevents a certain use of land and is ultimately determined to be *invalid*, do the Fifth and Fourteenth Amendments to the United States Constitution require that the property owner be compensated for the interim damages suffered while awaiting the judicial declaration of invalidity?

The answer to these issues is, of course, that compensation is not required in either instance, and the California Supreme Court so held.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of . . . property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"

1. Compensation for Valid Land Use Regulation.

The classical, and perhaps universal, approach to this "taking issue" as it applies to land use regulation is, and always has been, to invalidate the regulation when it is found that the application or enforcement of the regulation would constitute a "taking" within the meaning of the above-quoted constitutional provision. *See, e.g., Hadacheck v. Sebastian,* 239 U.S. 394 (1915); *Euclid v. Ambler,* 272 U.S. 365 (1929); *Berman v. Parker,* 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). See also, *Bosselman,* The Taking Issue, An Analysis of the Constitutional Limits of Land Use Control, Council on Environmental Quality (U.S. Printing Office, 1973).

Not a single case has been cited to this Court, nor, it is submitted, does any case exist, which holds that rather than invalidating the legislation which allegedly constitutes a taking, a Court should, or may, award money damages as just compensation and permit the otherwise unconstitutional legislation to be enforced. Petitioners recognize in their Petition that there is a total absence of judicial authority for the awarding of compensation as an alternative to the declaring of a particular piece of legislation as invalid and ineffective. Petitioners, however, find themselves in a situation

in today's complex economy where they feel that they would be better off being compensated for the "takings" which they allege to have occurred rather than having their "property" returned to them by way of judicial nullification of the allegedly offending land use regulation.

In order to accomplish this end, the Writ of Certiorari herein attempts to create a *second* test for an "unconstitutional taking" which is separate and distinct from that which our Courts, both State and Federal, have addressed themselves to in the myriad cases where the *validity* of a land use regulation was attacked as an alleged "taking". *Euclid v. Ambler*, 272 U.S. 365 (1929); *Berman v. Parker*, 348 U.S. 26 (1954); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 412 (1922); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1961). Petitioners, recognizing that no basis exists for compensation under the authority of any of the foregoing decisions, postulate the existence of this second "taking" which apparently differs in both kind and quality from that recognized as existing by *any* Court in this nation.

The *second* "taking", as asserted by Petitioners, concedes the validity of the land use regulation involved—that it is not invalid under the foregoing authorities, but alleges that such *valid* regulation so substantially diminishes the value of the land involved, that the Fifth Amendment to our Constitution somehow mandates the payment of compensation for the diminished value of the property. *No authority exists for the payment of such compensation.* Indeed, Petitioners' arguments appear to be not that such compensation

must be paid under the constitutional mandate of the Fifth Amendment, but, rather, that the equities of our modern economy are such that compensation *should* be so provided.

As the California Supreme Court correctly recognized in its decision herein, absent a constitutional mandate that compensation be paid, it is for the legislature to determine the extent to which government shall be liable for any damages which its governing causes its citizens to suffer.

2. Compensation for Invalid Land Use Regulation.

The second aspect of the Petition for Writ of Certiorari herein claims that the Petitioners are somehow constitutionally entitled to damages incurred during that period of time necessary to judicially establish the alleged invalidity of the subject land use regulation. Petitioners assert no basis for distinguishing the sufferance of such damages from the damages suffered by any person or business required to resort to the judicial processes in order to assert or protect a given right, be it constitutional or contractual. The Fifth Amendment of the United States Constitution does not guarantee that a citizen of the United States will never suffer money damages as a result of the action of the federal or any of the state governments; it merely attempts to guarantee that the citizens' property will never be taken without the payment of just compensation.

Again, the damages sought by Petitioners are not those for which compensation is required to be paid by the Constitution, but, rather, are those which Petitioners would have the Court believe are equitably

desirable. It is, of course, unfortunate when government regulation, or government action of any kind, causes a citizen to suffer or to lose dollars. This is so whether the dollars are invested in real estate and lost by virtue of a legislatively enacted land use regulation, or the dollars invested in the stock market and are lost by virtue of the action of some governmental entity, be it the S.E.C. suspending the trading of the stock, or the Food and Drug Administration prohibiting the sale of the company's major product. The fact that it is unfortunate that such monies are lost is, however, a far cry from the conclusion or determination that our Constitution requires that government compensate its citizenry for all dollar damages which it inflicts upon such citizens. This is not the law; indeed, this cannot be the law.

As the California Supreme Court stated in the decision attacked herein (15 Cal. 3d at 519, Petition, at p. 33):

> "Courts have thus recognized that '[o]f course, it is not a tort for Government to govern. . . .' (*Dahlehite v. United States* (1952) 346 U.S. 15, 57 (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal. 2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state. (Cf. *City & County of San Francisco v. Cooper* (1975) 13 Cal. 3d 898; *Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87.)"

Conclusion.

By reason of the foregoing premises, and particularly the logical and legal soundness of the decision of the California Supreme Court which stands as its own best defense, Real Parties in Interest respectfully urge that the Petition for Writ of Certiorari herein must be denied.

Respectfully submitted,

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EXHIBIT A.

[Modification of Opinion

(15 C3d 508, — Cal.Rptr. —, — P.2d —).]

[L.A. No. 30382. In Bank. Dec. 24, 1975.]

HFH, Ltd., Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest.

[L.A. No. 30383. In Bank. Dec. 24, 1975.]

Von's Grocery Company, Petitioner, v. The Superior Court of Los Angeles County, Respondent; City of Cerritos et al., Real Parties in Interest.

THE COURT.—The opinion herein, appearing at 15 Cal.3d 508, is modified as follows: On page 516, footnote 13, lines 4 and 5, delete the reference to Code Civ. Proc., § 1094.5 and substitute therefor: Code Civ. Proc., § 1085.

On pages 516 and 517, delete the last line in text on page 516 and the first two lines in text on page 517 and substitute therefor: no 'taking' of the property. . . ." (10 Cal.3d at pp. 127-128.)[14]

On page 518, delete line 6 and substitute therefor: value due to zoning action.[15]

On page 518, delete footnote 15 and substitute therefor:

[15]Thus, while we have not hesitated to afford individuals the full measure of the protection indicated by the history of article 1, section 19, no California case has ever interpreted the "or damaged" phrase of our state Constitution to cover mere diminution of market value of property due to zoning action.

On page 520, delete line 12 and substitute therefor: hold that inverse condemnation lies for any zoning action which substantially reduces

On page 521, delete line 30 and substitute therefor: zoning action which results in the substantial diminution of market value. That we

BLEED THROUGH